No. 10580

In the United States
Circuit Court of Appeals
For the Ninth Circuit

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellant,

vs.

EDWARD J. JASPER, Administrator of the Estate of Emmet C. Jasper, deceased; and ALBERT BROWN,

Appellees,

CHARLES M. DAKE,

Defendant.

APPELLEES' BRIEF

Appeal from the District Court of the United States for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND

SUBJECT INDEX

INDEX OF AUTHORITIES

Pages

TABLE OF CASES

INDEX OF AUTHORITIES
(*Continued*)

Pages

TABLE OF CASES

INDEX OF AUTHORITIES
(*Continued*) Pages

TABLE OF CASES

STATUTES

FEDERAL RULES OF CIVIL PROCEDURE

TEXTS

ANNOTATIONS

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Appeal from the District Court of the United States for the District of Oregon.

STATEMENT OF THE CASE BY APELLEES EDWARD J. JASPER, ADMINISTRATOR OF THE ESTATE OF EMMET C. JASPER, DECEASED, AND ALBERT BROWN.

One route from Portland to the Oregon coast is westerly through Forest Grove, thence about seven miles to Gales Creek and on about six miles to Glenwood. From the latter place there are two routes, one southwesterly to Tillamook over the Wilson River

Highway, and the other northwesterly to Necanicum and Cannon Beach over the Wolf Creek Highway.

To reach the logging operation of Harold E. Wells on Round Top Mountain, one would drive about four miles westerly from Glenwood, turn to the right off of the Wilson River Highway and drive about seven miles to the operation. Wells operated on one side of Round Top in 1941 and on another side in 1942. He had a crew of eight men (R. 83) which included Charles M. Dake, his head loader, who went to work for Wells in July, 1941 (R. 93 and 105) and Corvin Sheldon, his engineer and handy man (R. 99). Wells was a logging contractor for C. E. Powell, his father-in-law, (R. 80, 85) with whom Wells lived at Jennings Lodge near Oregon City when Wells went home.

On the 1941 operation four of the men, including Wells and Dake, lived in a bunkhouse at the site of the work. The International pickup truck, owned by Wells and involved in the accident in the case at bar, was kept there (R. 74). It was probably a one ton truck (R. 144). Dake, with Wells' knowledge, drove the pickup some at that time to go hunting and to pick up guy wires and chokers (R. 74-75, 86, 106-107, 109). Sometimes Dake asked Wells for permission to use the pickup and other times he didn't ask him, although Wells was sometimes in the logging camp on week ends. If Dake wanted use of the truck he took it (R. 107). Wells allowed Mr. Haskins, with whom he at one time lived at Gales Creek, to use the pickup to haul furniture as well as wood about two or three

weeks before the trial (R. 89-90, 96) and about a week before the trial Wells permitted Corvin Sheldon to haul wood in the truck (R. 96). Wells never hesitated to send any of his men to take the truck on Round Top (R. 97). Dake probably used the pickup a dozen times while at the first camp, and he also used Wells' gun (R. 108). Wells knew that Dake had no gun, and Wells loaned his gun to Dake lots of times (R. 166). Wells also knew that Dake had no car of his own (R. 86).

In 1941 Dake was allowed by Wells to move Dake's personal property from Portland to Forest Grove in the pickup (R. 90, 95, 149-150). Dake also used the pickup to go fishing (R. 112-113), to obtain half a case of beer at Timber (R. 110-111), and he also drove it to Tillamook a couple of months before the accident (R. 149, 159).

On occasions Dake purchased gasoline for the truck and sometimes for a car owned by a friend (R. 109, 111). These purchases were at Round Top from the logging commissary. Dake was paid every two weeks, and his pay checks showed these deductions (R. 110). Wells saw most of the gasoline tickets (R. 85). Dake got gasoline for the trip of June 28, 1942, which resulted in the accident involved in the case at bar, from the loading tank which belonged to the logging job, filling both the tank of the pickup as well as a five-gallon can which he took along (R. 137).

During May and June, 1942, when Wells was logging at the second camp site, he lived during the work

week with Haskins at Glenwood and Dake lived during the work week and week ends with the Adkins at Gales Creek, about six miles easterly from Glenwood (R. 78-79). On the mornings of work days one of Wells' men, Dake part of the time, would drive the pickup from Gales Creek to Glenwood from whence Wells would drive to the camp. Upon return following work Wells would drive from the camp to Glenwood, where he got out, and one of his men would drive the truck back to Gales Creek. Necessarily the keys for the pickup were available or it couldn't have been driven. The pickup remained at the Adkins place in Gales Creek during the evenings and nights of working days and some week ends (R. 91, 112).

Wells was driving the pickup out of the woods on Friday evening, June 26, 1942, and Dake and Corvin Sheldon were with him in the front seat. A hunting trip between Dake and Sheldon was discussed, and it was also arranged to fix the horn on the yarder on the same trip. The pickup was to be used for these purposes on Sunday, June 28, 1942. All this Wells knew. (R. 81, 87, 114-116, 131-133). Wells drove the pickup to Jennings Lodge or Oregon City, with Dake as a passenger, so the latter could bring the vehicle back to Gales Creek. Wells, at Jennings Lodge or Oregon City, gave Dake Wells' rifle (R. 81). Dake testified that Wells expected part of whatever game Dake might kill (R. 128). At Wells' home at Jennings Lodge or Oregon City Wells said he threw an empty gasoline drum in the back of the pickup, to be

taken to the woods (R. 87); Dake thought he picked up two there (R. 116). Dake then drove the truck to Gales Creek, seven miles westerly from Forest Grove. Of course he had the keys to the truck (R. 87).

Sunday morning Sheldon didn't show up so Dake took the pickup and gun, went to the logging camp and killed two deer (R. 118) and returned to Gales Creek about 10 A. M. (R. 120). Tires on the truck were rationed (R. 99) but logging operations had priority as to tires and the truck had a "T" gasoline card (R. 102).

After eating at the Adkins, Dake started off in the pickup to hunt again with Wells' gun. He got one or one-half mile westerly from Gales Creek when he picked up the two women and a man (R. 121). He still intended to again hunt on Round Top (R. 148) or, if he could find no game there, at another place twenty or twenty-five miles from Gales Creek toward Tillamook (R. 148-149).

At this time and for some time before Wells was short-handed on his logging operation and had been doing the work of one man himself (R. 88-89). Wells had given his crew to understand he was looking for good men (R. 89, 147), and one reason for Dake's trip to Tillamook on that Sunday was to contact his cousin, Mike Lewis, and either bring him back to go to work on Wells' crew or have him contact Wells. The cousin was already working in a shipyard (R. 126, 147-148).

The relationship between Wells and Dake is illustrated by the employment above mentioned, the loans of the gun and the use of the truck and the further facts that at the time of trial Dake was paroled to Wells (R. 105) and went to work for Wells as his head loader immediately upon Dake's release from the penitentiary (R. 94).

SUMMARY OF ARGUMENT

The findings of the trial court have the same effect as the verdict of a jury. They should not be set aside unless clearly erroneous, due regard being given to the opportunity of the trial court to judge of the credibility of the witnesses. Even inferences drawn by the trial judge go to support his findings.

In the two cases mainly relied upon by appellant, the defendants prevailed in the trial courts and the judgments were affirmed. Under the above rules, had those judgments been for the plaintiffs, they would still have been affirmed.

Permission to use the motor vehicle involved may be either express or implied.

Under the "omnibus clause" contained in the insurance policy involved in the case at bar appellant is liable. The Oregon law is that where the owner of a motor vehicle gives permission to another to use it, such use is covered by the owner's insurance policy even though the person using the vehicle uses it in a way or goes to places not contemplated by the owner.

The use of the adjective "actual" in the omnibus clause in its phrase "actual use" does not change the foregoing rule.

The issue in the present case of permissive use of the vehicle by Dake at the time of the accident, with the consent of the owner, Wells, was and is not made res adjudicata by the litigation in the state court.

ARGUMENT

I. ACTUAL USE OF TRUCK BY DAKE WAS WITH PERMISSION OF WELLS

This topic is the first of the two branches of the argument in appellant's brief, and we answer it as such.

THE FINDINGS BELOW

The court below heard all of the witnesses, no depositions having been taken. It found (R. 33-34):

> "That the actual use of the said International pickup truck by Charles M. Dake at the time of the collision hereinbefore mentioned, which is the automobile described in said policy of insurance issued by plaintiff and which policy is involved in this action, was with the permission of said Harold E. Wells, the named insured in said policy of insurance; that the actual use of said truck by the said Dake at the said time and said place of the said collision was within the contemplation of said Harold E. Wells."

This finding, as well as the finding on appellant's assertion of res adjudicata which we hereinafter dis-

cuss, have the same effect as the verdict of a jury.

28 U.S.C.A., Sec. 773.

National Surety Co. v. Globe Grain & Milling Co. (C.C.A. 9) 256 F. 601, 602, citing with approval

Dooley v. Pease, 180 U.S. 126, 21 S. Ct. 329, 45 L. ed. 457, 460, and

Meyer v. Everett Pulp & Paper Co., 193 Fed. 857, 863.

Rule 52 (a) of the Federal Rules of Civil Procedure provides in part:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The preamble to this Court's own rules specifies:

> "The Federal Rules of Civil Procedure, whenever applicable, are hereby adopted as a part of the rules of this Court with respect to appeals in actions of a civil nature."

Rule 52(a) was cited and quoted from by this Court in

Gates v. General Casualty Co. (C.C.A. 9) 120 F. (2d) 925, 927

as follows:

> "On this issue appellants must show the court's findings are 'clearly erroneous' due regard being 'given to the opportunity of the trial court to judge of the credibility of the witnesses,' all but one of whom was heard by that court."

This Court, in affirming the decision of the same court which tried the case at bar, in

Rothman v .Wilson (C.C.A. 9, Ore.) 121 F. (2d) 1000, 1006

again cited Rule 52(a) and said:

> "The evidence was conflicting and we feel bound by the findings of the trial court."

Again in

United States v. Chinook Inv. Co. (C.C.A. 9, Ore.) 136 F. (2d) 984, 985

the same court was affirmed, this language being used:

> "While the case is a close one on its facts, we are not prepared to say that the finding is clearly erroneous."

To the same effect are

> *Clark & Wilson Lumber Co. v. McAllister* (C.C. A. 9, Ore.) 101 F. (2d) 709, 714-715.
>
> *Lumbermens Mut. Casualty Co. v. McIver* (C.C. A. 9) 110 F. (2d) 323, 324.

Even inferences drawn by the trial judge from the circumstances go to support the findings. In

Pacific American Fisheries v. Hoof (C.C.A. 9) 291 Fed. 306, 308

the trial court had prefaced its general findings with the statement,

> "'I think it is established by positive testimony and inferences from circumstances adduced,' * * *."

This Court said:

> "What circumstances the court had in mind we are not advised. * * * but whatever the allu-

> sion, it does not impair or lessen the effect of the general finding on the question of negligence."

Appellant places great reliance upon the cases of *Frederiksen v. Employers' Liability Assur. Corporation* (C.C.A. 9, Cal.) 26 F. (2d) 76 and

Trotter v. Union Indemnity Co. (C.C.A. 9, Wash.) 35 F. (2d) 104

in each of which the lower court was affirmed. It is stated on page 105 of the latter decision:

> "But it is unnecessary to discuss the evidence further than to show that in the most favorable view to appellant it is conflicting or that it is reasonably susceptible to opposing inferences. That being true, the findings of the trial court are controlling * * *."

In both the Frederiksen and Trotter cases the defendants prevailed in the trial courts and the judgments were affirmed. Under the rules above stated, had the plaintiffs prevailed below, the judgments would still have been affirmed.

PERMISSION TO USE VEHICLE MAY BE EXPRESS OR IMPLIED

We believe that the evidence above summarized abundantly shows that Dake had express permission from Wells to use the pickup truck at the time of the accident. It is well settled, however, that such permission need not be express. Under the authorities it may be implied.

Hinton v. Indemnity Ins. Co. of North America (Va.) 8 S.E. (2d) 279, 283

> "In Tomasetti v. Md. Casualty Co., 1933, 117 Conn. 505, 169 A. 54, 55, a case somewhat similar in its facts to the instant case, it was held that the word 'permission,' unqualified by the adjective 'implied,' in an insurance policy, is used in the sense of leave, license or authority. Such permission, said the court, 'is not necessarily limited to that granted by arrangement between the parties or otherwise in definite, express terms. It may arise and be implied from a course of conduct, pursued, with knowledge of the facts, for such time and in such manner as to signify, and be compatible only with, an understanding consent amounting to a grant of the privilege involved.'
>
> " 'The word "permission" has a negative rather than an affirmative implication; that is, a permitted act may be one not specifically prohibited as contrasted to an act affirmatively and specifically authorized. That it appears in automobile policies would indicate that any one having permission or color of authority is included within the clause. * * *.' Brower etc. v. Employers' Liability Assur. Co., Ltd., etc., 1935, 318 Pa. 440, 177 A. 826, 829."

In

American Casualty Co. of Reading, Pa., v. Windham (C.C.A. 5) 107 F. (2d) 88, 90

the following quotation is found:

> "Permission to use a car may be implied in the absence of express prohibition."

In

72 A.L.R.

in the annotation relating to "omnibus" coverage

clause, page 1375 at 1398, the editor thereof makes the following comment:

> "'Permission' to take and use the car upon a particular occasion, within the meaning and effect of 'omnibus' clause, may, in a proper case, be implied by usage and common practice of the parties."

In

Hodges v. Ocean Accident & Guarantee Corporation (Georgia) 18 S.E. (2d) 28, 31

the following language is found:

> "The term 'permission' is universally held to mean either express or implied permission."

EFFECT OF "OMNIBUS CLAUSE" IN POLICY

The policy of insurance issued by appellant which is involved in this case includes a so-called "omnibus clause" which creates liability insurance not only for the benefit of the named insured but for the benefit of those who come under the clause and meet its requirements.

The principle is stated in the most recent A.L.R. annotation dealing with "omnibus" coverage clauses as follows:

126 A.L.R. 544, 545

> "* * * independently of the general insuring clause in automobile liability policies, there often appears within the policy, or by way of a rider or indorsement attached thereto, a clause purporting, or the effect of which is, to extend the protection of the policy to any person or persons

coming within a defined group. This constitutes the so-called 'omnibus' clause * * *."

The policy involved in this case provides in part as follows:

> "The unqualified word 'Insured' wherever used in coverages A and B and in other parts of this policy, when applicable to such coverages, includes the named Insured and, except where specifically stated to the contrary, also includes *any person* while using the automobile and any person or organization legally responsible for the use thereof, provided the *actual use* of the automobile is with the *permission of the named Insured.*" (Italics ours.)

Had there been any restrictions as to time, place, route or purpose placed by Wells on the use of the vehicle by Dake or had the court below believed that the use of the vehicle by Dake at the time of the accident was not contemplated by Wells then, and then only, it would have been necessary for the trial court to decide which of two divergent lines of authority it would follow. The view of the case taken by the court below made this unnecessary. Should this Court decide that that view was wrong it will then want to consider the authorities which follow.

The authorities throughout the country are divided in their support of two different rules which are applicable to factual situations analogous to those involved in this case if, and only if, the Court views all of the evidence in the light most unfavorable to appellees.

One group of distinguished authorities holds that where the owner of a motor vehicle gives permission to another to use it, such use is covered by the owner's insuranec policy even though the person using the vehicle uses it in a way or goes to places not contemplated by the owner.

Maryland Casualty Co. v. Ronan (C.C.A. 2) 37 F. (2d) 449, 450.

U. S. F. & G. Co. v. DeCuers (D.C., La.) 33 F. Supp. 710, 712.

Dickinson v. Maryland Casualty Company, 101 Conn. 369, 125 Atl. 866, 869, 870, 41 A.L.R. 500.

Stovall v. New York Indemnity Co., 157 Tenn. 301, 8 S.W. (2d) 473, 476, 477, 72 A.L.R. 1368.

Peterson v. Maloney, 181 Minn. 437, 232 N.W. 790, 791-792.

Jefson v. London Guarantee & Accident Co., 293 Ill. App. 97, 11 N.E. (2d) 993, 995-996.

5 Am. Jur. "Automobiles" § 538, pp. 807, 808.

Annotation in 72 A.L.R. 1375 at 1401-1403, supplemented in 106 A.L.R. 1251 at 1259 and 126 A.L.R. 544 at 552.

Another group of authorities holds that permission to use the vehicle by another includes only such use as was contemplated by the owner and that any use outside of such contemplation prevents the insurance policy coverage from attaching.

Frederiksen v. Employers' Liability Assur. Corporation (C.C.A. 9, Cal.) 26 F. (2d) 76.

Trotter v. Union Indemnity Co. (C.C.A. 9, Wash.) 35 F. (2d) 104.

Huddy, Cyclopaedia Automobile Law (9th Ed.) 407-409.

Annotation in 72 A.L.R. 1375 at 1403-1405, supplemented in 106 A.L.R. 1251 at 1260-1262 and 126 A.L.R. 544 at 552-553.

OREGON LAW

Under the familiar Erie decision and the similar decisions which followed it, the quest is always for the local law. The law in Oregon is in harmony with the Dickinson, Ronan and Stovall cases cited supra under the first line of authorities. The Oregon Supreme Court has cited those cases with approval in a case which has never been modified or departed from in the eight and one-half years since its rendition. In doing this the Oregon Supreme Court, inferentially at least, refused to adopt as the law in Oregon the two cases upon which appellant so heavily relies, the Frederiksen and Trotter cases, which arose, respectively, in California and Washington.

The Oregon case referred to is

Denley v. Oregon Automobile Insurance Co., 151 Or. 42, 47 P. (2d) 245 (47 P. (2d) 946 dealing with attorney's fees)

The case involved an automobile liability policy issued to Yamhill County and which provided that the described automobile was to be used by the county health nurse. It contained an omnibus clause to the

effect that coverage should apply to any person operating the car with the permission of the assured, and that such person should be known as an "additional insured." It was held that Judge Kennedy, County Judge of Yamhill County, was an "additional insured" while he was driving the car in the performance of his official duties. The court held that the policy covered the use of the insured car by the legal representatives of Yamhill County, notwithstanding a provision in the policy that the automobile would be used by "Health Nurse of Yamhill County." The court stated on pages 250-251 of 47 P. (2d):

> "In the following cases the court in construing a policy of insurance gave effect to conditions similar to the above 'additional assured' clause: Dickinson v. Maryland Casualty Company, 101 Conn. 369, 125 A. 866, 41 A.L.R. 500; Maryland Casualty Company v. Ronan (C.C.A.) 37 F. (2d) 449, 72 A.L.R. 1360; Odden v. Union Indemnity Company, 156 Wash. 10, 286 P. 59, 72 A.L.R. 1363; Stovall v. New York Indemnity Company, 157 Tenn. 301, 8 S.W. (2d) 473, 72 A.L.R. 1368. All these cases have placed a liberal construction on policies containing such clauses."

The Denley case stands for the proposition that in Oregon the bailee of a motor vehicle is an additional assured within the meaning of an omnibus clause such as that involved in the case at bar if the bailee had permission or consent to start out with the vehicle in the first instance.

The effect of so citing the Dickinson, Ronan and Stovall cases with approval is, of course, well understood in law. It was never better exemplified than in

Jones v. New York Casualty Co. (D.C., Va.) 23 F. Supp. 932, 934, 936, 937

where Judge Pollard said:

> "Where there has been a deviation from the use for which permission or consent was granted, there is a division in the authorities as to the construction which should be placed upon the words 'permission or consent of the named assured' as used in the ordinary omnibus clause of an insurance policy. One line of authorities holds to the view that permission or consent to the particular use being made of the car must have been given, and in order to classify the person using the automobile as an additional assured under the policy he must be using the car at the time of the accident in a manner and for a purpose contemplated by the permission or consent given by the named assured. Another line of authorities holds to the view that only permission or consent to take and use the car must have been given, and in order to classify the person using the car as an additional assured all that is necessary is that he must have permission or consent to start out with the automobile in the first instance. The leading case in support of the doctrine last mentioned is Dickinson v. Maryland Casualty Co., 101 Conn. 369, 125 A. 866, 41 A.L.R. 500. That case has been followed by many others, notably the case of Stovall v. New York Indemnity Co., 157 Tenn. 301, 8 S.W. (2d) 473, 72 A.L.R. 1368, and other cases cited in the note at page 1405.
>
> * * * * *
>
> "In view of the well-defined division in the authorities it does not seem probable that the Virginia Court would have ventured to cite with apparent approval the leading case adopting one of these views and base its conclusion at least partly on that doctrine unless it intended to embody that doctrine into the Virginia law; and this is especially true in view of the fact that the

Court had already given one apparently sound reason as the basis of its decision.

* * * * *

"From a careful consideration of these authorities, this Court is constrained to conclude that the Supreme Court of Appeals of Virginia has adopted as the Virginia law the doctrine announced by the Dickinson Case as applicable to a state of facts identical with the facts of that case. While the facts in the Dickinson Case and in the instant case are different in certain respects, they are in legal effect identical. This being so, it is the duty of this Court to find that the permission or consent given by Ruth Goodrick to Thomas Piercy to use the automobile, although qualified, must be construed in contemplation of the policy as a permission or consent for Thomas Piercy to use the automobile for the purpose it was being used at the time of the accident, and that Thomas Piercy was within the contemplation of the policy using the car at the time of the accident with the permission or consent of the named assured."

The Jones case was cited with approval in

American Casualty Co. v. Windham (C.C.A. 5)
107 F. (2d) 88, 90

and in

American Casualty Co. v. Windham (D.C., Ga.)
26 F. Supp. 261, 264

EFFECT OF THE ADJECTIVE "ACTUAL" IN THE PHRASE "ACTUAL USE"

Motor vehicle policies formerly provided, in the omnibus clause:

"* * * provided the use of the automobile is with the permission of the named insured."

They now generally provide, as does the policy in the case at bar:

"* * * provided the actual use of the automobile is with the permission of the named Insured."

That this distinction is without a difference is shown by

Vezolles v. Home Indemnity Co. (D.C., Ky.) 38 F. Supp. 455, 457-458, 458 (affirmed in 128 F. (2d) 257)

where the court said:

"The defendant contends that the issue presented by the cases above referred to is not the one before the Court in this case because of the wording in the policy here involved which differs from the wording of the policies in those cases. In those cases the policies provided in substance that the insurance covered an operator of the car other than the owner if the use or operation of the car was with the permission of the named assured. In the present case the policy requires that 'the *actual* use' be with the permission of the named assured. (Italics our own). It is contended that the phrase 'actual use' is much more limited in its scope than the word 'use' as contained in earlier policies; that it means that the particular use made of the vehicle both at the time of the accident and at the place of the accident must be actually authorized by the owner, * * * The distinction as claimed by the defendant and supported by Appleman is discussed, criticized and rejected in Haeuser v. Aetna Casualty & Surety Co., supra. 'Actual use' means the use of the car at the time under consideration, as contrasted with the 'declared use' which refers in the policy to a future contemplated use. The use of the car by one other than its owner is in fact

its actual use. In my opinion the question presented is the same regardless of the different wording in the more recent policies.

"* * * The purpose of the omnibus clause was to extend the coverage beyond the limitations which would otherwise exist under the law of principal and agent."

The following language appears in

Haeuser v. Aetna Casualty & Surety Co. (La.) 187 So. 684, 688

"The views of Mr. Appleman are confidently relied upon by counsel and are pressed upon our consideration. We find ourselves, however, unable to agree with Mr. Appleman's conclusions. The change from 'use' to 'actual use' does not seem to us in any sense important nor is the purpose clear. Moreover, the statement that 'under the newer wording it is almost essential that the use made of the vehicle at the time of the accident must be one actually contemplated by all parties when the bailment was made' seems to us entirely gratuitous. The important word in the last proviso of the clause is 'permission'. The automobile must have been used with the 'permission' of the named assured and it must actually have been used with the 'permission' of the named assured. The introduction of the word 'actual' as a qualification of the word 'use' is said to change the connotation of the text so as to mean use within the scope of the permission granted. If the proviso as it appears in the present policy could be so interpreted the one considered in Parks v. Hall, supra, may also be so construed for if we interpolate the equivalent of the phrase 'within the scope of the permission granted' in the one case we may do so in the other, there being no words of such import in either proviso. The reliance upon the word 'actual' as a qualification of 'use' to bring about this remarkable result seems

to us untenable.
* * * * *

"It would have been so simple to have indicated that intention by the use of appropriate language such, for instance, as requiring that the use of the automobile be within the scope of the permission granted."

II. APPELLANT'S CLAIM OF RES ADJUDICATA

The judgment of the state court in the litigation entitled "Edward J. Jasper, Administrator of the Estate of Emmet C. Jasper, deceased, Plaintiff, vs. Harold E. Wells and Charles M. Dake, Defendants" (R. 14-22, 36-41) was on December 30, 1943, affirmed by the Oregon Supreme Court. At present writing the opinion in that case has not yet appeared in the advance sheets of the Pacific Reporter. It is to be found in Vol. 37, No. 13, Ore. Adv. Sheets, December 30, 1943, page 585.

This opinion merely leaves the case at bar in exactly the same condition it was in before the opinion was handed down, that is, exactly as it was when the present case was tried in the court below. It has long been the Oregon law that the pendency of an appeal does not affect application of the doctrine of res adjuicata in a situation where that doctrine should be applied.

Ton Toy v. John Gong, 87 Or. 454, 170 Pac. 936, 938

"In this state it is the established rule that the force of a decree as a plea or as evidence remains unimpaired until it is reversed or modi-

> fied, and consequently Ton Toy was entitled to use the decree as evidence to support his plea of former adjudication." (Citing cases)

To the same effect is

> *Jaloff v. United Auto Indemnity Exchange,* 121 Cr. 187, 253 Pac. 883, 886.

Appellant on page 33 of its brief sets forth the last two special findings of the jury in the state litigation. It neglected to set forth the first special finding, which was as follows:

> "Was defendant Dake at the time of the collision driving said pickup delivery truck as the agent, servant or employee of defendant Wells and in pursuance of Wells' business? Yes."

Appellant's claim (complaint) in the case at bar alleges that Dake was on a personal mission of his own at the time of the accident and that he was then using the pickup truck without the permission of Wells (R. 4, Par. VI). That was the issue tendered by appellant in the present case. The claim alleged the pendency of the state litigation (R. 4, Par. VII). Appellees desired to raise the defense of the adequacy of appellant's remedy at law in the state litigation but could not do so by demurrer, demurrers being abolished by Federal Rule of Civil Procedure 7(c). This defense was, therefore, raised by them in their answers in which, as a first affirmative defense that appellant's claim failed to state a claim, the pendency of the state litigation was alleged. The proffered defense was resolved against appellees, the lower court

finding jurisdiction and proceeding to enter findings, conclusions and judgment.

Appellant will not in its reply brief or in oral argument deny that in opposition to said defense it served on counsel for appellees and handed to the court below its "Memorandum of Authorities submitted by Plaintiff at Pre-Trial Conference" in which appellant stated:

> "In this respect the Court's attention is called to the distinction herein of the policy provision namely that liability shall attach under the policy to drivers of the car other than the owner provided 'the actual use of the automobile is with the permission of the named insured.' There is no such issue between the parties in the State Court action."

The complaint in the state litigation alleged that the defendants, i. e., Wells and Dake, operated the vehicle negligently in certain specified respects at the time of the accident (R. 16-17, Par. V). This is, of course, a familiar method of alleging agency.

L. B. Menefee Lumber Co. v. MacDonald, 122 Or. 579, 260 Pac. 444, 447

> "The act of the agent can be charged as the act of the principal."

To the same effect is

> *Independence Indemnity Co. v. Grants Pass & Josephine Bank* (C.C.A. 9, Ore.) 29 F. (2d) 83, 85

In the State litigation both Dake (R. 19-20, Par. I) and Wells (R. 21, Par. I) denied the alleged agency

and affirmatively alleged that Dake's use of the truck was without Wells' permission or consent. This affirmative allegation did not, and for the reasons hereafter shown could not, go to the broader conception of "permission" involved in the case at bar. It went merely to the more narrow concept of permission involved in any agency. To establish agency the principal's consent or permission, express or implied, is necessary.

Kantola v. Lovell Auto Co., 157 Or. 534, 72 P. (2d) 61, 62

> " 'Agency,' as defined by the American Law Institute, Restatement of Agency, § 1, 'is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.' "

This same distinction between the two concepts of the word "permission" distinguishes the bulk of the cases cited upon appellant's brief, since they are cases involving questions of agency.

Kazdan v. Stein (Ohio) 160 N.E. 704
(P. 28, appellant's brief) involved the consent clause of a liability policy, but the case, like the Frederiksen and Trotter cases, was merely affirmed on conflicting evidence.

In the state litigation liability of Wells could not be predicated upon his mere permission to Dake to use the pickup, in the absence of allegations and proof that the vehicle was in some manner defective and that Wells knew or should have known that, or that

Wells knew or should have known that Dake was an incompetent driver. No such allegations were made in the state litigation. There is no Oregon decision or statute which makes the owner of a motor vehicle liable for the negligence of a bailee of the vehicle. The Oregon cases are to the contrary.

Brown v. Fields, 160 Or. 23, 83 P. (2d) 144, 145-146, 146

> "The authorities are numerous supporting the proposition that, where an automobile is turned over, by an owner, to a prospective purchaser who drives it for the purpose of testing it out, the relationship of bailor and bailee is created and the doctrine of respondeat superior has no application. (Citing cases.) It is equally well settled in the absence of statute to the contrary that the bailor can not, under such circumstances, be held liable to some third person for the negligence of the prospective purchaser unless the bailor knew or had reasonable grounds for believing that the prospective purchaser was so careless, reckless and incompetent that injury to others might reasonably be anticipated from his operation of the car.
>
> "* * * We conclude that the only reasonable deduction to be made from the evidence is that the defendants had no reasonable ground for believing that Charles Walsborn was incompetent to drive the automobile, and, since the relationship of bailor and bailee existed, the defendants are not liable."

Kantola v. Lovell Auto Co., 157 Or. 534, 72 P. (2d) 61, 63-64

> "In 5 Am. Jur. § 353, p. 694, the authors say: 'At common law, liability for the negligent use of an automobile by one other than the owner can-

not be predicated against the owner merely because of such ownership.'

"It is stated by the author in Huddy, Encyc. of Automobile Law, (9th Ed.) vol. 7-8, at page 297, that: 'It is clear that, when the owner of an automobile permits another to have the possession and use of it as a bailee, the owner is not liable for the negligent conduct of such bailee. In such a case, the borrower, not the owner, is the person liable for negligence in its operation.'

"It is not even suggested in the record that Kildall was an incompetent driver or, if incompetent, that the defendant had knowledge of that fact. Nor is it suggested that he was an unlicensed driver or that the automobile was out of repair and not suitable for the purposes for which it had been delivered to Kildall. There was, therefore, no ground upon which the bailor could be held liable for the negligence of the bailee."

This distinction is well stated in the case of *Vezolles v. Home Indemnity Co.* (D.C., Ky.) 38 F. Supp. 455, 456 (affirmed in 138 F. (2d) 257) where the court said:

"The third paragraph of the answer pleading the state court judgment as a bar was stricken by the Court on plaintiff's motion. The issue involved in the state court trial was not the same issue as was involved in this action. The directed verdict in favor of Morton decided that Ruemmele was not the agent of Morton. It did not decide that Ruemmele was using the car without the permission of Morton. Liability on the part of Morton in that action was predicated upon the relationship of principal and agent. Liability on the part of the Insurance Company in the present case is predicated upon the fact of permissive use of Morton's car by Ruemmele. The relationships of principal and agent and permissive use are en-

> tirely different. Permissive use of the car by Ruemmele could exist without the relationship of principal and agent existing."

The principle is also stated in

Western Casualty & Surety Co. v. Strozier (Ga.) 19 S.E. (2d) 433, 435

as follows:

> "It should be noted that the rules of law used in determining the liability of an insurance company which issued the automobile liability policy to the master are not necessarily coextensive with the ordinary rules of master and servant as would be applied if a suit was against the master for the negligent acts of the servant injuring a third person."

Any reference to the word "permission" in the opinion of the Oregon Supreme Court in the state litigation must be confined to the agency permission involved in that litigation. To extend such reference further than that would be to employ dicta as authority. In

Mutual Orange Distributors v. Agricultural Prorate Commission (D.C., Cal.) 30 F. Supp. 937, 941

wherein a statutory three judge court sat, Mr. Justice Stephens said:

> "The idea that such a proceeding could be prevented by rushing ahead and having a pronouncement made that the Prorate Act in the abstract was constitutional was erroneous in itself. We hold that the expressions on the constitutional questions in the prohibition case were dicta. Dicta, of course, is not authority (Norris v. Moody, 84 Cal. 143, 24 P. 37), and cannot be

> the basis for res judicata or the basis for the 'face of the judgment rule' as argued by the Commission in this case."

The matter of "permission" involved in the case at bar has not been determined by the state litigation.

Ross v. Beacham (D.C., S.C.) 33 F. Supp. 3, 8

> "A judgment is not conclusive on any point or question which from the nature of the case, the form of action, or the character of the pleadings could not have been adjudicated in the suit in which it was rendered."

National Surety Co. v. Jenkins (C.C.A. 8) 18 F. (2d) 707, 710

> "Since it is a matter which could not properly have been litigated, and was not actually litigated, and was not necessarily determined by the decree, in the former suit, it is not concluded by that decree, although it was put in issue by the pleadings."

This case was reversed on other grounds in 48 S. Ct. 445, 277 U.S. 258, 72 L. ed. 874. On the above point, at p. 876 of the Law Edition the court said:

> "We think the court below was right in holding that the earlier litigation had determined only that the National Surety Company was not entitled to be subrogated to the treasurer's claim and remedies against the insolvent bank until he had been paid in full, and in no way involved the National Surety Company's present separate claim on its contract of indemnity, and that the plea of res judicata was consequently ineffective."

To like effect are

Gamble v. L. B. Menefee Lumber Co., 149 Or. 79, 39 P. (2d) 667, 668, and

Norwood v. Eastern Oregon Land Co., 139 Or. 25, 5 P. (2d) 1057, 1061.

On the issue of res adjudicata the court below found (R. 32-33):

> "That the judgment entered in the action entitled Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, versus Harold E. Wells and Charles M. Dake, defendants, which action was tried in the Circuit Court of the State of Oregon for Clatsop County, is not res adjudicata as to the defendant Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased; that the issues decided in said state court action are not determinative of this action; that the defendants are not barred from asserting their defenses herein; that the same issue or issues herein were not tried and determined in said state court action; that there is not an estoppel of judgment against the defendants as a result of the said judgment entered in said state court action."

Under the first dozen authorities cited in this brief this finding should be permitted to stand.

CONCLUSION

We respectfully submit that under the local law which the trial court applied under the doctrine of the Erie case and under the better law in effect over the nation, the trial court's opinion, findings and conclusions and judgments were correct and should be affirmed.

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